by MAYFIELD, J., in his dissenting opinion, it was held there was a fatal variance between a declaration alleging a freight train had commenced to back up, uncontrolled by brakeman or engineer, and proof that the train was moving forward under the order of the conductor. As MAYFIELD, J., said, the negligence charged in the principal case was that of the engineer, while that proved (if any) was by the conductor or flagman. Where definite acts of negligence are alleged, proof will be confined to those acts, nor can a recovery be had upon proof of other acts of negligence. See 22 ENCY. PL. & PR. 527 and the cases there cited, also *Chun* v. *Ky. etc. Receivers,* 23 Ky. Law Rep. 1092, 64 S. W. 649; *Thompson* v. *Citizens St. Ry. Co.,* 152 Ind. 461; *Gagan* v. *City of Janesville,* 106 Wis. 662; *Moss.* v. *North Car, R. R. Co.,* 122 N. C. 889; *Raming* v. *Metropolitan St. Ry. Co.,* 157 Mo. 477. Many cases hold the variance, to be material, must mislead or surprise the adverse party, and it is often provided by statute that the other party must have been actually misled. 31 CYC. 703. Thus in *Oborn* v. *Nelson,* 141 Mo. App. 428, an averment that plaintiff was injured while performing his duties as pressman, and proof that he was an assistant, but performed the same duties, was held not a material variance. See also *Texas & P. Ry. Co.* v. *Kirk,* 62 Tex. 227. A variance may be waived by failure to object at the proper time. *Linquist* v. *Hodges,* 248 Ill. 491; *Cohen* v. *Giveen Mfg. Co.,* 141 App. Div. 616, 126 N. Y. Supp. 505. As to what is material must necesarily vary with different judges. The principal case seems to indicate a most liberal tendency on the part of the Alabama court, to be commended if not carried too far, but it would seem that one purpose of pleading—notice to the other side—was not sufficiently accomplished in that case. Furthermore it seems to establish a new rule of construction in that jurisdiction. In *Smith* v. *Causey,* 28 Ala. 655 the court said: "plaintiff averred that the dogs were defendant's; and although this averment was unnecessary, yet, as it is descriptive of the tort complained of, it can not be disregarded. The tort alleged is an injury done by the servants with defendant's dogs. To allow a recovery for an injury done with other dogs would be to set up by proof a cause of action different from that alleged, and of which the defendant had no notice." See also *Birmingham etc. Ry. Co.* v. *Brannon,* 132 Ala. 431; *Alabama Great So. Ry. Co.* v. *Fulton,* 150 Ala. 300; *Southern Ry. Co.* v. *Hundley,* 151 Ala. 378.

VENDOR AND PURCHASER—ACTUAL NOTICE OF DEFECTIVELY ACKNOWLEDGED CONVEYANCE.—Action to enforce rights in a tract of land. Plaintiff claimed under a mortgage, duly recorded but not acknowledged. Defendant, though he had found plaintiff's mortgage on file, claims as bona fide purchaser from the plaintiff's mortgagor, because of the lack of proper acknowledgment of the mortgage. *Held,* a conveyance which has not been acknowledged or proved, so as to be entitled to record, but which in fact has been recorded in the office of register of deeds, is void as to one who subsequently buys the land with actual knowledge of the contents of the record, if he is otherwise an innocent purchaser for value. *Nordman* v. *Rau* (Kan. 1911), 119 Pac. 351.

In this country it has been uniformly held that the record of a conveyance,

executed in conformity to law, operates as constructive notice to all subsequent purchasers or incumbrancers, provided the instrument be one which the law authorizes to be recorded. 1 STORY EQ. JUR., § 403; *Tilton* v. *Hunter,* 24 Me. 29. But in the absence of statutory provisions to the contrary, a conveyance is not constructive notice, because copied into the registry, if it has not been duly executed, acknowledged or proved so as to entitle it to registration. *Loughridge* v. *Bowland,* 52 Miss. 546; *Washburn* v. *Burnham,* 63 N. Y. 132; *Pringle* v. *Dunn,* 37 Wis. 449. And it is generally established that a deed of conveyance without an acknowledgment is valid between the parties and as to all others having actual notice of such instrument. *Hayden* v. *Peirce,* 165 Mass. 359; *Cable* v. *Cable,* 146 Pa. St. 451; *Bass* v. *Estill,* 50 Miss. 300. What constitutes actual notice it is difficult to determine from the authorities. In *Cambridge Val. Bank* v. *Delano,* 48 N. Y. 326, it is said, "Where a purchaser has knowledge of any fact sufficient to put a prudent man upon an inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make the inquiry, and if he does not do so the law will charge him with the actual notice he would have received had he made it." There is conflict in the adjudications as to whether a conveyance unacknowledged but recorded will so put a person upon inquiry as to be the basis of actual notice. The weight of authority is contrary to the view of this question taken in the principal case. *Hastings* v. *Cutler,* 24 N. H. 481, is a leading case sustaining the proposition that the inspection of a writing which purports to be a certified copy of a recorded deed, although it shows that the record was improperly made, because the deed was defectively acknowledged, is a fact sufficient to put the purchaser upon inquiry, so that if he neglected to make a proper inquiry the inference of actual notice would be necessary. This is true also if the acknowledgment be entirely wanting. *Rooker* v.*Hoofstetter,* 26 Can. Sup. Ct. 41; *Woods* v. *Garnett,* 72 Miss. 78; *Musgrove* v. *Bonser,* 5 Ore. 313; *Walter* v. *Hartwig,* 106 Ind. 123; *Gilbert* v. *Jess,* 31 Wis. 110; *Musick* v. *Barney,* 49 Mo. 458. The principal case draws its chief support from *Kerns* v. *Swope,* 2 Watts 75, in which it was held that the fact of inspection of the record of a defectively acknowledged instrument was not one from which actual notice could be inferred, because it was not sufficient to put a purchaser upon inquiry. Mr. POMEROY in his EQUITY JURISPRUDENCE, (Ed. 3), at page 989, referring to the *Swope* case says, "This decision seems to be unsound; at least its correctness is very doubtful; it seems to misinterpret the nature of facts sufficient to put a purchaser upon inquiry, and to confound them with absolute and complete knowledge." In WADE, NOTICE, at page 107, it is said, "From a careful consideration of the authorities, old and new, English and American, it seems that the better doctrine is now, except where the statute is imperative in its provisions to the contrary, that any species of notice, by which one seeking to purchase real estate is informed of, or cautioned in regard to, any unregistered instrument affecting the title to the property * * *, will effectually bind the property in the hands of such purchaser." Until the decision in the principal case, *Kerns* v. *Swope, supra,*

seems to have been the only case involving the precise question and supporting the doctrine adhered to in the former. A dissenting opinion in *Horton* v. *State, supra,* contends for application of the majority rule.

WILLS—LIMITATION REPUGNANT TO DEVISE IN FEE.—Where land was devised to a daughter of testator, to her heirs and assigns forever, with authority to sell or dispose of the whole or any part of it, and if daughter should die without children, then said estate, "or any part or portion" thereof which she "shall leave" shall vest in the defendants. *Held,* such devise gave the daughter a fee simple with absolute power of disposition, and the limitation over is void as inconsistent with the rights of the daughter as holder of such fee. *Bennett* v. *Association to Provide and Maintain a Home for the Friendless* (N. J. 1911), 81 Atl. 1098.

The court concluded the testator intended to give the daughter a fee simple with absolute and unlimited power of disposition, and not merely an estate for life. An unqualified bequest is not reduced to a life estate merely by a further provision that *whatever remains* at the death of the legatee shall vest in others. *Rozell* v. *Thomas,* (Tenn. Ch. App.) 39 S. W. 350; *Browning* v. *Southworth,* 71 Conn. 224, 41 Atl. 768. The devise in the principal case was absolute. It gave the property to the daughter without limitation or qualification. Therefore the gift over upon the death of the daughter without children is void. The gift over was not of the *entire* legacy, which would perhaps have qualified the original gift and made it a gift for life, but is of "any part or portion of the same * * * as she may leave at her decease." It is elementary that a fee cannot be limited upon a fee. MINOR, REAL PROP., § 737; 2 WASHBURN, REAL PROP., Ed. 5, 589; *Robertson* v. *Hardy's Admr.,* (Va.) 23 S. E. 766; *Wolfer* v. *Hemmer,* 144 Ill. 554, 33 N. E. 751. The unlimited power of disposition involves the idea of absolute ownership. Where there is an absolute power of disposition, a limitation over is held to be inconsistent with the exercise of such power, and is therefore void. 4 KENT, COM., Ed. 13, 199; *Robertson* v. *Hardy's Admr., supra; Ramsdell* v. *Ramsdell,* 21 Me. 288. After devising an estate in fee a limitation over of that which remains at the death of holder of such fee has been held void in *Appeal of McKenzie,* 41 Conn. 607, 19 Am. Rep. 525; *Wilson* v. *Turner,* 164 Ill. 398, 45 N. E. 820. The court in the principal case affirms the doctrines laid down in *Downey* v. *Borden,* 36 N. J. L. 460; *Rodenfels* v. *Schumann,* 45 N. J. Eq. 383, 17 Atl. 688; *McCloskey* v. *Thorpe,* 74 N. J. Eq. 413, 69 Atl. 973; *Tuerk* v. *Schueler,* 71 N. J. L. 331, 60 Atl. 357; *Annin's Ex'r.* v. *Van Doren's Admr.,* 14 N. J. Eq. 135. The cases of *Wooster* v. *Cooper,* 53 N. J. Eq. 682, 33 Atl. 1050 and *Tooker* v. *Tooker,* 71 N. J. Eq. 513, 64 Atl. 806, are distinguishable in that in those cases the court expressly found there was no intent to convey a fee and therefore the limitations over therein were valid.